

# **2015 Annual Report of the Iowa Consumer Credit Code**

The Attorney General is directed by Chapter 537 of the Iowa Code to administer the Iowa Consumer Credit Code (hereinafter "ICCC"). Since 1974, the Attorney General has delegated primary authority for the administration and enforcement of the ICCC to the Consumer Protection Division (hereinafter "CPD"). The head of the CPD is the Administrator of the ICCC and has traditionally appointed a Deputy Administrator to oversee the day-to-day duties of regulating and enforcing the ICCC. The current Administrator, appointed in July of 2015, is Jessica Whitney, Director of the CPD, and currently two Assistant Attorney Generals, Amy Licht and Max Miller, spend time on ICCC cases and issues.

The Administrator's responsibilities under the ICCC include resolving complaints, investigating serious complaints, formulating and carrying out litigation, drafting legal opinions, conducting consumer credit educational activities and programs, and monitoring the status of consumer credit in the state. The Administrator coordinates with other Iowa agencies, other states with versions of the Uniform Consumer Credit Code, and federal agencies with oversight of the consumer credit industry.

Iowa Code section 537.6104(5) directs the Administrator to report annually on the ICCC and the state agencies charged with administering the ICCC, as well as the general availability of credit. This report is broken down into sections that correspond with the reporting requirements of Iowa Code section 537.6104(5).

The contents of this report are compiled from the previous year's report, with relevant information updated to reflect recent changes.

## **1. Consumer Complaints**

Iowa Code section 537.6104 allows the Administrator of the ICCC to handle consumer complaints and encourage voluntary compliance with Code requirements. The Administrator engages in a conscious effort to combine those two responsibilities. When handling consumer complaints, the Administrator generally seeks voluntary compliance first and takes legal action second or as needed.

The processing, assignment, and handling of ICCC complaints are a part of the daily activity of the CPD. The CPD received a total of 2598 written consumer complaints during the 2015 calendar year, at least 420 of which were filed directly pursuant to the ICCC. Though complaints whose main focus was credit concerned about 16% of the total received by the CPD, hundreds of other complaints also involved credit although not classified as such, like complaints about home improvements, auto issues, and increasingly the financing of cell phones.

Complaints concerning credit ranked highly in the top categories of consumer complaints and should continue to be regarded as an area of major concern. The credit complaints break down as follows, with their rank in relation to other categories of complaints:

### **3. Home Mortgages**

201

7. Debt Collection	92
11. Motor Vehicle Credit	61
19. Credit Cards	34
20. Student Loans	32

For all complaints, many of the inquiries handled by the CPD can be resolved by explaining the applicable provisions of the ICCC to those involved in the complaint. Other times, the office must first investigate the complaint and determine the facts in order to outline to the parties how the law applies to their situation. The CPD strives to resolve the complaints in a manner that makes the consumer whole, where appropriate.

Complaints concerning debt collection practices fell for the second straight year. The CPD's policy toward debt collection complaints is to resolve them at the administrative level, obtain redress for any aggrieved consumers, and stop any problematic practices. Article 7 of the ICCC sets forth with impressive thoroughness exactly what debt collection techniques, practices, and procedures are prohibited. Most debt collection complaints are filed by consumers aggrieved by what they believe is an unlawful debt collecting practice. Generally, the CPD resolves the problem through an informal agreement with the lender or debt collector. When the ICCC is clearly violated, the CPD requires not only redress for the aggrieved consumer but the Administrator may seek and obtain an Assurance of Discontinuance pursuant to Iowa Code section 537.6109 where the creditor or collector clearly states that they have been notified as to what is wrong with their practice in question and that they are agreeing to discontinue it. In some instances, the creditor or collector is able to demonstrate either that there has been no violation of the ICCC or that any violation was unintentional and the creditor or collector intends to comply with the statute.

When informal resolution of debt collection complaints is insufficient, the CPD engages in enforcement actions to ensure Iowa lenders and debt collection agencies keep their practices in compliance with the ICCC. Members of the CPD also consult with other states regarding debt collection and frequently participate in multistate efforts to investigate larger debt collection companies.

Additionally, the CPD continues to receive a number of complaints based upon problems arising from home mortgages, both the origination and servicing of mortgage loans. The CPD continues to be involved in multistate investigations involving mortgage servicing. We also receive many complaints involving mortgage foreclosure rescue scams. The CPD handles these complaints on an individual basis. The CPD has also been involved in multistate and federal efforts to attempt to track down these often temporary companies.

Subprime auto finance continues to be an area of concern. In addition to traditional "Buy Here, Pay Here," dealers, the securitization of subprime retail installment contracts has resulted in increases in the number of auto finance complaints and ICCC violations. The CPD is looking closely at this area and pursuing potential multistate action.

In addition to the formal written complaints the CPD receives, the day-to-day work of the attorneys and investigators assigned to ICCC inquiries, complaints, and investigations often

involves interacting with the borrowing public, credit industry representatives, attorneys, and representatives of other state agencies about compliance with the ICCC. Iowa Code section 537.6104(1)(d) requires the Administrator to counsel persons and groups on their ICCC rights and duties. The day-to-day activities in administering the ICCC involve numerous emails, telephone calls, letters, informal interpretations, responses, and resolutions between the CPD staff office and the various parties outlined above. In addition to advice given via phone and email, the CPD also issues what are called informal advisory opinions, which are written responses to questions concerning credit and/or the interpretation of the ICCC. In 2015, the office did not publish any informal advisory opinions, but did respond to numerous phone and email requests concerning the interpretation of the ICCC.

## **2. Credit Education**

The ICCC also requires that the Administrator establish educational programs on credit practices and problems. *See* Iowa Code § 537.6104(1)(e). With limited staff to devote to ICCC matters, the CPD has made education for consumers, the lending industry, and members of the Bar a top priority.

Once again CPD staff members made a number of presentations to large groups concerning state and federal consumer credit laws. In February the then Administrator Bill Brauch, then Deputy Administrator Jessica Whitney, and Assistant Attorney General Chantelle Smith presented at the Iowa Credit Union League Annual Conference. Their presentation focused on consumer credit frauds and issues specifically targeting the elderly. In April, then Deputy Administrator Jessica Whitney and Assistant Attorney General Patrick Madigan gave a presentation for the Iowa State Bar Association regarding financial regulation and the latest issues. In July, Investigator Kathi Gosnell presented at the annual Jump\$Start conference for educators regarding choosing colleges, which included a discussion of financing options.

The CPD also participates in a variety of less formal consumer-oriented conferences, seminars, meetings, and speaking presentations, including presentations to graduate level college classes, law school classes, high school classes, and senior citizens' groups. The attorneys and investigators of the CPD speak around the state on the general topic of consumer fraud and protection in Iowa. Though these presentations deal more generally with the overall work of the CPD, they also discuss the basic provisions of the ICCC and often respond to specific ICCC questions from audience members. The CPD also assists with an Attorney General Booth each year at the Iowa State Fair, staffed by employees from throughout the Attorney General's office. Many of the questions from consumers visiting the booth pertain to consumer credit, and many of the educational materials offered to the public through the booth seek to inform consumers about the ICCC and its consumer credit protections.

The Division has also provided guidance and education in the field of motor vehicle financing. The staff has given advice on continuing education courses for motor vehicle dealers, focusing on motor vehicle finance. The staff also routinely answers questions from motor vehicle trade groups and many of those questions are finance-related. Throughout 2015, a video presentation featuring CPD Director Whitney was shown as part of the training of Iowa used

motor vehicle dealers pursuant to the requirements of Iowa Code section 322.7A. Consumer credit issues were interwoven throughout the presentation.

In monthly publications entitled "Consumer Focus" the CPD reaches tens of thousands of Iowans. The "Consumer Focus," are bulletins that provide tips and information to consumers on relevant consumer issues. During 2015 topics addressed in these bulletins included debt collection, buying (and financing) a used car, veterans' issues, service contracts/extended warranties, and identity theft. The bulletins are sent statewide to over 3,000 groups and communities and are free to reprint and redistribute. They are also available on the Attorney General's website.

In addition, to public speaking, meetings, and publications, staff members also have informal discussions and meetings with industry and affected individuals. It is not uncommon for representatives of various businesses or members of the credit industry to come into the CPD office with their attorneys to ascertain what they must do to comply with the ICCC. Staff members regularly respond to questions posed by other state agencies, as well. The many ICCC-related questions posed to staff members during all these public contacts shows that there is still a great deal of confusion about the law, and that even a stronger educational campaign may be needed.

### **3. Developments in Iowa Consumer Credit Law**

In 2015, there were two Iowa Court of Appeals cases and one federal district court case which addressed or interpreted the ICCC.

In *Citibank, N.A. v. Surber*, 14-0190, 2015 WL 5278952 (Iowa Ct. App. Sept. 10, 2015), the Court of Appeals reviewed an appeal by the defendant-debtor challenging the findings of fact underlying the trial court's ruling for the plaintiff-creditor. The court reaffirmed the holding, made in *Capital One Bank (USA), N.A. v. Denboer*, 791 N.W. 2d 264 (Iowa Ct. App. 2010), that the common law "account stated" cause of action was recognized in Iowa for the collection of consumer credit card debts and that it was not precluded by, but rather coexisted with, the ICCC. *Surber*, 2015 WL 5278952, at \*1.

The other Court of Appeals case concerning the ICCC was *Capital One Bank (USA), N.A. v. Taylor*, 13-2043, 2015 WL 7567398 (Iowa Ct. App. Nov. 25, 2015). The *Taylor* court reaffirmed the validity of the amount stated cause of action. *Id.* at \*566. The court also held "that a failure to file a notification pursuant to section 537.6202 is not a violation of the ICCC that allows an individual defendant in a debt collection action to pursue a counterclaim for unfair debt collection practices under the IDCPA [Iowa Debt Collection Practices Act, ICCC §§ 537.7101 et seq.]" *Id.* at \*5. The defendant-debtor in *Taylor* claimed that National Bank, the plaintiff-creditor, was acting as a "debt collector" pursuant to ICCC § 537.5201(1), and was therefore required to file notice with the Iowa Attorney General under ICCC § 537.6202; that the creditor's attempt to collect a debt without having filed such notice constituted an unfair debt collection practice under ICCC § 537.7103(1)(f); and that the debtor had a private right of action against the creditor, on the basis of such practice, pursuant to ICCC § 537.5201. 2015 WL 7567398, at \*3. The *Taylor* court rejected this argument. The court was persuaded to reach this

decision by the logic of *Ross v. Vakulskas Law Firm, PC*, No. 106CV641006DEO, 2012 WL 4092419 (N.D. Iowa Sept. 17, 2012); for a full discussion of that case, see the 2012 Annual Report of the Iowa Consumer Credit Code. Because the court disposed of the plaintiff's claims on other grounds, the court did not consider the plaintiff's claim that Capitol One was subject to the notification filing requirement, *Taylor*, 2015 WL 7567398, at \*4 n.4; however, note that national bank preemption typically applies to such notice filing requirements.

The final relevant issue raised in *Taylor* concerned the sufficiency of the right to cure notice required under ICCC § 537.5110. For such notice to be sufficient, it must "includ[e] an itemization of any delinquency or deferral charges." ICCC § 537.5111(1). The debtor argued that the notice failed to itemize incurred "Late Payment Fees" and was therefore insufficient under law. However, the court accepted the creditor's argument that such fees were treated as "purchase transactions" under the cardholder agreement and added to principal, and therefore not required to be separated itemized apart from principal owed. *Taylor*, 2015 WL 7567398, at \*7.

The federal district court in *Scott v. Portfolio Recovery Associates, LLC*, 139 F. Supp. 3d 956 (S.D. Iowa 2015), addressed a number of issues relating to the Iowa Debt Collection Practices Act ("IDCPA"), ICCC §§ 537.7101 et seq. Although the court's interpretation of Iowa law is non-binding on Iowa courts, the case is worth noting as Iowa courts may consider it persuasive. The court made numerous holdings concerning specific provisions of the IDCPA. The primary holding of the court's decision is that protections for consumer debtors under the IDCPA also protect consumers wrongly identified as debtors. In other words, if a debt collector pursues a debt in an illegal way, the debt collector is not protected from liability to a plaintiff just because it was also pursuing the wrong person.

In *Scott*, a creditor obtained a default judgment against a defaulted debtor. The creditor and its attorney then sought to garnish the wages of the debtor, but misidentified the plaintiff as the debtor (because of their similar names) and garnished the plaintiff's wages instead. A lawsuit followed.

One question raised in *Scott* was whether the prohibition on false threats of illegal acts contained in IDCPA § 537.7103(1)(e) still applied if the threat was carried out. The same question was raised with respect to the analogous provision in the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq. The federal court followed "the majority view [which] holds that § 1692e(5) [of the FDCPA] applies to completed acts in addition to mere threats." *Scott*, 139 F. Supp. 3d at 968. The court then applied the same logic in interpreting the Iowa statute, holding that "unauthorized garnishment, in addition to false threats of garnishment, is properly included in the meaning of [IDCPA] § 537.7103(1)(e)." *Id.* at 973674.

The court also held that unauthorized garnishment fell within the plain meaning of IDCPA § 537.7103(1)(f), which "expressly prohibits debt collectors from taking actions prohibited by law." *Id.* at 974.

The plaintiff in *Scott* also argued that when the defendant contacted her employer it violated IDCPA § 537.103(3)(a), which restricts communications concerning a debt to persons other than the debtor (or others who might be liable for the debt, such as a co-signer). The

defendant argued that the plaintiff could not bring such a claim because she was not actually the debtor, and therefore fell outside the protections of the IDCPA. The court considered the same arguments with respect to the analogous provisions of the FDCPA, and held that what mattered for purposes of standing was not whether or not the plaintiff was the true debtor or not; what mattered was whether or not the defendant communicated with a third party about an alleged debt. *Id.* at 966. The court then reached the same conclusion with respect to IDCPA § 537.103(3)(a). *Id.* at 974.

The court also rejected the defendant's argument that unintentionally misrepresentative statements were not prohibited by IDCPA § 537.7103(4)(e), and held that the section explicitly applied to both intentionally and unintentionally misrepresentative statements. *Id.* at 974.

Finally, the court made two holdings with respect to IDCPA § 537.7103(5)(d). First, the court held that the section applied to both debtors and alleged debtors. *Id.* at 974-975. Second, the court considered the argument that conduct prohibited elsewhere in the IDCPA could not provide a basis for liability under IDCPA § 537.7103(5)(d). The court stated that IDCPA § 537.7103(5)(d) was analogous to FDCPA § 1692f(1). *Id.* at 975. Section 1692f, which prohibits "unfair or unconscionable means to collect or attempt to collect a debt," is a sweep-up provision, meant to prohibit conduct not otherwise prohibited elsewhere in the FDCPA. *Id.* at 970. Conduct prohibited elsewhere in the FDCPA cannot also provide the basis of an additional violation under 1692f. The court held that similarly, conduct prohibited elsewhere in the IDCPA could not also provide the basis of an additional violation under § 537.7103(5)(d). *Id.* at 975.

Claims relating to the ICCC were raised in one additional federal case, but after dismissing all the federal claims the court declined to exercise supplementary jurisdiction over the state law claims. *Lynch v. Custom Welding & Repair, Inc.*, 142 F. Supp. 3d 814, 823 (N.D. Iowa 2015).

#### **4. Agency Reports on Consumer Credit**

Two state regulatory units are charged by Iowa Code § 537.6105 with enforcing the ICCC with respect to the lending institutions they license and regulate: the Iowa Division of Banking and the Iowa Division of Credit Unions. Throughout the year the Administrator has frequent contact with these agencies regarding interpretation and enforcement of credit code provisions and changes in the consumer credit industry. The Administrator notifies a regulatory agency when the CPD receives a complaint involving one of the agencies' licensees. Likewise, the agencies alert the Administrator of serious violations that come to their attention. The Agencies work together with the Administrator whenever appropriate.

Each agency examines its licensees for ICCC compliance during the agency's regular, periodic examinations. The Credit Union Division, overseeing the state's 95 credit unions, examines each credit union every twelve to fourteen months. The Credit Union Division received one ICCC-related complaint in 2015. The Banking Division oversees licensing for 280 state-chartered banks and 794 loan companies, including delayed deposit locations, mortgage bankers, industrial lenders, and regulated lenders. State-chartered banks are examined every 12 to 18 months, alternating with the federal regulator. The various loan companies are examined every

12 to 24 months depending on the type of company. Delayed deposit companies, industrial lenders, and regulated lenders are examined annually. Mortgage bankers, nonresident industrial lenders, and nonresident regulated lenders are examined every 24 months. In 2015, the Banking Division received 7 complaints relating to the ICCC .

## **5. Consultation With Other Jurisdictions**

The CPD benefits from the experience and knowledge of credit code administrators in other states by participating in the American Conference of Uniform Consumer Credit Code States (ACUCCCS) every year. The conference is an excellent forum at which to discuss common problems in UCCC administration and collectively work toward fair resolution. The meetings enable each state to keep its administration of its consumer credit code in harmony with other jurisdictions as required by section 537.6104 of the Iowa Code.

The 2015 ACUCCCS meeting was held in Indianapolis, Indiana. All credit code states attended the meeting. The hottest topic for discussion was the continued growth of internet lending. In particular, internet lending controlled or facilitated by Native American Tribes continued to be a very relevant topic, and the states updated each other on the ongoing litigation involving the legality of this type of lending. Internet lending by domestic and foreign corporations was also discussed. Other important topics concerned subprime auto lending, mortgage servicing, and high interest lending. States again shared updates regarding their various experiences working together in large multistate groups as well as with the federal Consumer Financial Protection Bureau. And, as always, discussion on legislative changes to each state's statute was held.

The ACUCCCS states also keep in regular contact via an email listserve. The listserve provides an excellent opportunity for discussion of potential changes in the law regarding consumer credit and the states' interpretation of portions of the ICCC.

## **6. Availability of Consumer Credit**

By keeping in frequent contact and exchanging information with other state consumer credit administrators throughout the year, the CPD has been able to keep abreast of trends in the nationwide consumer credit industry. Unfortunately, we have been unable to compile information regarding the availability of credit to Iowa consumers due to the high cost of such data gathering and lack of any current data gathering system.

However, from its contacts with consumers, businesses, and the industry, as well as other state agencies, the CPD is able to assess the availability of credit anecdotally. Currently, credit is widely available to almost all Iowa consumers. However, the quality of the credit that may be available to some is suspect. Thanks to the proliferation of direct deposit services (also known as payday loans) and hard-to-police internet loans, much of the credit available to some consumers is only available at a very high cost. Higher interest open-end credit, in the form of credit cards, also appears to be widely available. Additionally, student loan debt continues to rise, and is of a real concern in the future as the debt becomes due and is particularly difficult to discharge in bankruptcy. Subprime auto financing is a burgeoning concern with many auto loans now being

packaged and sold as securities. There is a fear that subprime auto loans might follow the same path that subprime mortgages did and lead to more global issues.

## **7. Changes to the ICCC**

There were no substantive legislative or administrative rule changes to the ICCC in 2015. Future changes may include updating the fees and technology references throughout the ICCC. A bill proposed by the Legislative Services Agency and passed by both chambers and signed by the Governor changed the definition of "Lender" from those provided in "this Act," to those provided in "this chapter." The previous use of the word "Act" was reference to the Federal Truth and Lending Act, and not the ICCC, which is a chapter under Title XIII. By changing the language to refer to exceptions in Chapter 537, the ICCC, it provides a more coherent definition, with exceptions, of "Lender."